SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

71 - 354

NO. ~~68 - 354~~

BEVERLY JANE BRODY, INDIVIDUALLY, ETC.,
ET AL,
MICKEY K. HARGITAY, ET AL,
Petitioners

VS.

AETNA CASUALTY & SURETY COMPANY, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 8, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO.

BEVERLY JANE BRODY, INDIVIDUALLY, ETC., ET AL,
MICKEY K. HARGITAY, ET AL,

Petitioners

VS.

AETNA CASUALTY & SURETY COMPANY, ET AL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Mrs. Beverly Jane Brody, widow of Sam Brody, suing in her own right for damages for the death of her said husband, and also suing in her capacity as guardian of her minor children Keith Alan Brody and Shirley Elizabeth Brody for damages for the death of their father; and Mickey K. Hargitay, suing in his capacity as guardian of his three minor children, Zoltan, Maria and Mickey Hargitay, Jr., for damages for the death of their mother, Jayne Mansfield Ottaviano (known

professionally as Jayne Mansfield), pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these consolidated proceedings on February 12, 1971.

The opinion of the Court of Appeals is reported at 438 F. 2d 1148. The opinion of the District Court for the Eastern District of Louisiana, New Orleans Division, rendered and entered on November 14, 1969, is unreported.

JURISDICTION

The judgment of the court below was entered on February 12, 1971. A timely petition for rehearing was denied on June 11, 1971. The jurisdiction of this court is invoked under 28 U.S.C.A. Sec. 1254 (1) to review the decision of the Fifth Circuit Court of Appeals in a negligence action arising in Louisiana and brought in the Federal Court of first instance on the grounds of diversity of citizenship.

QUESTIONS PRESENTED

I. Should a Federal Appellate Court remand to the District Court a diversity tort case whose outcome had been influenced by a jury charge on the Louisiana "slow speed" statute objected to by petitioners and at variance with the Louisiana jurisprudence as enunciated subsequent to the trial in the District Court? While the matter was still sub judice in the United States Court of Appeals for the Fifth Circuit, an intermediate State appellate court rendered a decision in a case whose facts were almost the same as in the instant case, interpreting

the "slow speed" statute as contended for by these petitioners in their request for jury charges. The Louisiana Supreme Court refused writs in the case.

II. Should a Federal Appellate Court remand to the District Court a diversity tort case in which the petitioners' request for a jury charge on negligence per se, refused by the Trial Court, would be granted on new trial, in view of a decision of the Louisiana Supreme Court rendered one month subsequent to the judgment now complained of in a remarkably similar case?

STATUTE INVOLVED

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 62 Stat. 944, 28 U.S.C.A. 1652.

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are:

Jayne Ottaviano (professionally known as Jayne Mansfield) and Sam Brody were killed on a highway leading into New Orleans when the automobile in which they were passengers struck the rear of a tractor-trailer rig at about 2:30 a.m. Injured in the accident were three of the minor children of Miss Mansfield by a former husband, Mickey Hargitay.

Richard Rambo, driver of the tractor-trailer rig, testi-

fied that for some distance he had been uncertain of the intentions of the driver of a City of New Orleans mosquito fogging truck equipped illegally with a flashing red light on the top of its cab, which truck was approaching the paved highway from the left side of the tractor-trailer. Rambo testified that he sensed an emergency and slowed his vehicle by gearing down; that after the fogging truck reached the highway and illegally turned to its left on the unpaved shoulder thereof, continuing for some 800 feet in the westerly direction in which the Rambo rig was headed, he followed said truck until it made another illegal left turn off the shoulder of the highway. It was Rambo's testimony that he never at any time during this interval stepped on his brakes, which would have flashed his stop lights, nor did he activate his four-way flashers, which are specifically designed to warn approaching traffic of emergency. It was his testimony that at the time his rig was struck in the rear, he was going approximately 40 mph. He also said that the fogging truck was pulling away from him at that time. The tachograph from the fogging truck proved conclusively that the truck did not exceed a speed of 5 to 7 mph. during the time that it was traveling on the shoulder of the highway. (Appendix 2223).

Defendants are Rambo, his employer, Johnson Motor Freight Lines, and its insurer Aetna Casualty & Surety Co.; James T. McLelland, driver of the mosquito fogging truck; his employer, the City of New Orleans, owner of the truck, and its insurer, Travelers Insurance Company.

The death car was being driven by Ronald Harrison, a minor 20 years of age, who was killed in the collision.

Originally, the parents of Harrison, Gus Stevens (owner of the car and Harrison's employer) and their insurers had been made defendants. Settlements were made with these defendants before trial, and they were dismissed from the case.

Plaintiffs requested the Trial Judge to charge the jury that McLelland, driver of the city fogging truck, was negligent as a matter of law because of his illegal use of the flashing red light and his illegal driving, both of which caused the emergency sensed by Rambo. (Appendix 2984, 2985). This charge was refused. (See appendix 3015-3016 for the charge actually given).

ARGUMENT

I. On the Louisiana "slow speed" statute, the court instructed the jury as follows:

> "This statute and ordinance requires a signal when a driver stops or suddenly decreases his speed. The signal is required by the statute or ordinance to be given *only to the driver of a vehicle immediately to the rear.* In order to prove negligence by violation of the statute or ordinance, the *plaintiffs must show by a preponderance of the evidence* that Mr. Rambo's truck stopped or suddenly decreased its speed; *that the Harrison vehicle was immediately to his rear,* and that Mr. Rambo had an opportunity to give a signal. *Unless all of these things are shown, Mr. Rambo's failure to give a signal would not violate the statute.*" (App. 3019-20) (emphasis supplied).

In *Fairbanks v. Travelers Insurance Co.*, 232 So. 2d

323, decided by the Louisiana Second Circuit Court of Appeal on February 3, 1970 (less than three months after the judgment in our case), the court said (232 So. 2d 327):

> "We have found no appellate court cases interpreting this statute since its enactment. * * *
>
> * * * * *
>
> "We are of the opinion that our Legislature, by adoption of LSA-R.S. 32:64 (B) has recognized that it is just as inherently dangerous for a vehicle to move at an unreasonably slow speed on the highway as it is to travel at an excessive speed. Either of these factors can be a contributing cause to an accident. The so-called "slow speed" statute is a protective statute having the same purpose and intent as the section of the Highway Regulatory Act prohibiting the stopping or parking of a vehicle on the paved portion of a highway. The jurisprudence has held that the obstruction of a highway is negligence per se, and if it is a cause in fact of an accident, it is actionable negligence.
>
> * * * * *
>
> "* * * Thus, the slightest degree of inattentiveness by the driver of the fast moving car, coupled with the unexpected presence of the unreasonably slow moving vehicle combines to cause a collision. Therefore, the negligence of each driver is a cause in fact of the accident."

The last paragraph of the above citation also highlights the error of the Trial Court in one of its charges which plaintiffs complained negated the application of

the concurrent negligence doctrine as applied in Louisiana tort cases. That charge was:

> "One seeking to recover must show that the cause imposing liability *is more reasonable than other likely causes.* If you find negligence on the part of anyone, *then you must next consider* in connection with proximate cause *whether it is established* by a preponderance of the evidence *that it is more likely that the accident happened as a result of that particular negligence than as a result of some other cause,* such as the negligence of someone else." (Appendix 3025). (Emphasis added).

II. Although the Court gave instructions with respect to the violation of highway safety regulations, it did not direct the jury to find that the mosquito fogging truck driver was negligent per se because of the nature of his operation of the vehicle as well as the use of the illegal flashing red light, despite said driver's own admissions. (Appendix 734, 742, 743, 751).

Before the Court gave its charges with respect to the violation of safety statutes, it gave this charge:

> "To establish negligence by the driver approaching the highway it must be shown that his conduct was such as to indicate to a reasonable man the possible presence of danger or that he could not or would not yield the right of way." (Appendix 3015).

In the case of *Pierre v. Allstate Insurance Co.*, 257 La. 471 242 So. 2d 821, 831 (which involved stopped rather than slow-moving vehicles), the Supreme Court

of Louisiana on rehearing December 14, 1970 (rehearing denied January 18, 1971) said:

> "We conclude that the statutory prohibitions in this case against parking vehicles so as to impede or obstruct traffic not only were designed to avoid the possibility that a prudent driver could be forced to run into the parked vehicle or into another vehicle, but also were designed, * * * at least in part, to afford protection * * * from the hazard of confused or inattentive drivers colliding with stationary vehicles on the highway. Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 488, 137 So. 2d 298, 304. It follows that the act of parking the Chrysler so as to obstruct traffic was negligence per se in this case.
>
> * * * *
>
> "* * * Negligence is determined not by the grade or degree of risk created by breach of duty, but by whether in fact there was a risk or hazard.
>
> "* * * Where causation in fact is a breach of a duty imposed to protect from the particular risk involved and this breach is an act negligent per se, the mere fact that there is a later and intervening negligent actor who helped to create the particular risk involved will not absolve the first negligent actor from responsibility. This is not to say that intervening negligence can never supersede the original act of negligence so as to relieve the original actor from liability. Dixie Drive It Yourself recognized that the intervening negligence of another could relieve the original wrongdoer of liability, but it stated that such a theory should not be used to relieve all but the last wrongdoer from liability."

In *Badeaux v. Paterson Truck Line, Inc.*, 247 So. 2d 875, 882, the Court of Appeal of Louisiana, Third Circuit, said, in speaking of one of the State's highway safety statutes (this one dealt with the setting out of flares or other warning devices by the drivers of stalled trucks, etc.):

> "LSA-R.S. 32:368 is a mandatory statute and gives those coming within its purview no choice as to whether they should comply with its terms. Hogan v. Travelers Insurance Co., La. App., 211 So. 2d 704. *Having found it to be applicable, therefore, we also find that Pearson was guilty of negligence per se in failing to obey it.* Womax v. Earl Gibbon Transport, Inc., La. App. 226 So. 2d 573." (Emphasis supplied).

The Supreme Court of Louisiana denied writs in the case on June 28, 1971. ..... La. ....., 249 So. 2d 209.

REASONS FOR GRANTING THE WRIT

The decision below decides questions of state law in conflict with decisions of the Louisiana State Courts of last resort in contravention of the Rules of Decision Act. Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, it has uniformly been held by this Honorable Court that "the law of the state" includes decisions of the highest court of the state as well as statutes of its legislature. And, as stated in *Huddleston v. Dwyer*, 322 U.S. 232, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246. "* * * * a judgment of a Federal Court ruled by State law and correctly applying that law as authoritatively declared by the state

courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones."

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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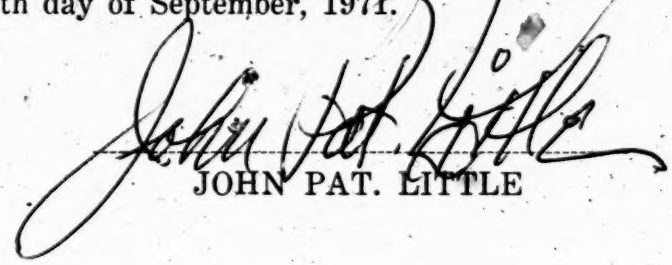
Counsel for Petitioners

September 8, 1971

CERTIFICATE OF SERVICE

I, JOHN PAT. LITTLE, a member of the Bar of the United States Supreme Court, certify that copies of the foregoing petition for Writ of Certiorari have been served on counsel for respondents herein by depositing same in the United States Mail, first class, postage prepaid, on this 8th day of September, 1971.



JOHN PAT. LITTLE

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NO. 67-1496
SECTION "C"

CIVIL ACTION
NO. 68-845
SECTION "C"

BEVERLY JANE BRODY, ET AL

VS.

AETNA CASUALTY & SURETY CO., ET AL
Consolidated With:
MICKEY K. HARGITAY, ET AL

VS.

AETNA CASUALTY & SURETY CO., ET AL

(Title of Third case no longer sub judice omitted.)

JUDGMENT

The above entitled action having been tried before the Honorable Court and a jury; and the cause of action against the defendants RICHARD H. RAMBO, JOHNSON MOTOR LINES, AETNA CASUALTY & SURETY COMPANY, JAMES T. McLELLAND, THE CITY OF NEW ORLEANS, and THE TRAVELERS INSURANCE COMPANY, having been dismissed; and the jury having answered the following stated interrogatories:

1. Do you find that the defendant, Richard H. Rambo, was negligent?

   Answer: No.

2. Do you find that the defendant, James T. McLelland was negligent?

   Answer: Yes.

   If you have answered either or both Questions 1 and 2 "Yes," then you should answer Question 3 and each of the following questions as indicated by the instructions to each.

   If you have answered both Questions No. 1 and 2 "No," then you should stop your deliberations and report your verdict.

3. Do you find that the deceased, Ronald B. Harrison, was negligent?

   Answer: Yes.

(NO. 4 OMITTED)

5. If you answered Question No. 2 "Yes," was the negligence of James T. McLelland a proximate cause of the accident?

Answer: No.

and having returned a verdict for defendants;

IT IS ORDERED, ADJUDGED AND DECREED that the above entitled and numbered civil actions be, and the same are hereby, dismissed with prejudice and costs.

Noy. 14, 1969

/s/ Alvin B. Rubin

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29275

BEVERLY JANE BRODY, Individually, Etc., ET AL
Plaintiffs-Appellants,

versus

AETNA CASUALTY & SURETY COMPANY, ET AL,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

---

February 12, 1971

Before GODBOLD, CLARK, and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge: After a lengthy trial, the jury found for the defendants in these cases brought for deaths and personal injuries suffered in a rear-end automobile accident. We affirm.

The accident occurred at approximately 2:30 a.m. on a straight two-lane stretch of U.S. Highway 90 on the outskirts of New Orleans, Louisiana. A car owned

by Gus Stevens and driven by Ronald Harrison struck the rear of the truck-trailer rig of Johnson Motor Freight Lines driven by Richard Rambo. In the vicinity of the accident the City of New Orleans, by its employee James T. McLelland, was operating a mosquito fogging truck equipped with a revolving red light on top.

All vehicles were traveling west toward New Orleans, the Johnson truck and the Harrison car in the north lane, the fog truck on the shoulder on the other (south) side of the highway. Rambo observed the flashing light on the fog truck and reduced his speed by letting up on the accelerator and gearing down. The extent of his reduction is in dispute. He did not apply his brakes so as to actuate his brake stop lights, nor did he apply other red flasher warning lights mounted on the rear of the trailer. The Harrison car, traveling at a speed variously estimated at 60 to 80 miles per hour, struck the rear of the trailer, whose rate of movement could have been, under the evidence, as high as 35 to 40 miles per hour and as low as a full stop.

Killed were Harrison, Jayne Ottaviano (professionally known as Jayne Mansfield) and Sam Brody. Three minor children of Jayne Mansfield were injured. Three separate actions were brought for the deaths of Mansfield and Brody and for the injuries to the minors, and were consolidated by the court.

Defendants were Johnson, its driver Rambo, and its insurer; the City of New Orleans, its employee McLelland, and their insurers; the parents of Harrison, Stev-

ens (owner of the car and Harrison's alleged general employer), and their insurers.

Before trial, settlements were made by Stevens, the Harrisons and their insurers, and they were dismissed as defendants. After a 16-day trial, in which plaintiffs were given the broadest leeway by a patient and painstakingly careful trial judge in presenting the evidence in the most minute detail, the jury, by special interrogatories, found that Harrison was negligent, that Rambo was not negligent, and that McLelland was negligent but his negligence was not a proximate cause of the accident.

We are faced with an undiscriminating array of claims of error, ranging from substantial to trifling. We have considered every one,[1] but we discuss only those which require or deserve it.

1

On the twelfth day of the trial the court refused to allow plaintiffs to reopen their case to present the testimony of witness Malbrough, an investigator for one of the insurers, to testify concerning a diagram he had made of the accident scene pursuant to a conversation with McLelland. The diagram had been revealed to plaintiff's counsel long before trial, and Malbrough's name given in answers to interrogatories which, though long delayed, were made before the trial.

The trial judge made his decision only after a hear-

[1] Numerous jury charges are claimed to be erroneous. With respect to many of them, it is impossible to tell from the appendix or the briefs whether the charge was objected to and at what point. We have considered each questioned charge as though there were a timely objection to it.

ing at which he gave an opportunity for counsel to be heard, and reviewed the circumstances leading to the request for reopening. This case exemplifies the wisdom of the principle that reopening is a matter peculiarly within the discretion of the trial court. There were factors tending in both directions. We cannot say even that the judge was wrong or that had we been trial judges we would have decided differently, and certainly we may not conclude that he exceeded the broad discretion given him. *Cf. Merritt-Chapman & Scott Corp. v. Frazier*, 289 F.2d 849 (5th Cir. 1961). Under the same rule, there was no error in refusing to allow plaintiffs to reopen to present the testimony of Cockfield.

2

The court refused to allow testimony of witness Vinot that on numerous occasions before the accident he had seen the City's fog vehicles emitting fog while on the highway shoulder in the vicinity of the accident. Appellants do not contend that Vinot's testimony was independently admissible as evidence of lack of care but in contradiction of testimony of Carmichael, superintendent of the City's fogging operations, that for three years prior to the accident the City did not fog on the shoulders in this area. Carmichael did not so testify. He described regulations promulgated by him which forbade fogging on the shoulders of high speed highways but he did not testify to past observance or lack of observance of the regulations.

3

The court did not err in submitting the jury the issue

of whether Harrison was negligent and whether such negligence was a proximate cause of the accident. Appellants' theory is that as a matter of law Harrison was not the servant, borrowed or otherwise, of Brody or Mansfield, so that his negligence is irrelevant. There were numerous conflicts in the testimony concerning the nature and details of Harrison's relationship with Stevens and of the arrangements between Brody and Harrison and Stevens for transporting Brody and Mansfield and the children from Biloxi, Mississippi to New Orleans, and of the extent to which the trip to New Orleans was for Stevens' benefit on the one hand and the personal benefit of Brody and Mansfield on the other. *Kiff v. Travelers Ins. Co.*, 402 F.2d 129 (5th Cir. 1968), relates to the court rather than the jury making findings on borrowed servant relationship where the facts are uncontradicted and unimpeached. It has no application here.

4

As part of the full charge on proximate cause the court said.

> "Proximate cause" means that not only must the negligent act or omission played [sic] a substantial part in bringing about or actually causing the injury or damage, but also that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.
>
> One seeking to recover must show that the cause imposing liability is more reasonable

> than other likely causes. If you find negligence on the part of anyone, then you must next consider in connection with proximate cause whether it is established by a preponderance of the evidence that it is more likely that the accident happened as a result of that particular negligence than as a result of some other cause, such as the negligence of someone else.

Appellants urge that the second paragraph is contrary to principles of concurrent negligence, that since the jury found both McLelland and Harrison negligent it may have found McLelland's negligence not a proximate cause because it considered Harrison's negligence the "more likely" cause. However, the paragraph must be considered along with the rest of the charge on proximate cause, the whole of which was developed in an orderly and rational sequence. It commenced, in the first-quoted paragraph, with an explanation of what is necessary for the negligence of one person to be a proximate cause and, in the second-quoted paragraph, articulated the distinction between proximate and remote (or "less likely") cause. In the second paragraph thereafter the court correctly described the interplay of the negligence of two or more persons contributing concurrently as proximate causes. *See Dixie-Drive-It-Yourself System v. American Beverage Co.*, 137 So.2d 298 (La. Sup. Ct. 1962):

5

It is claimed that in many respects the court erred in charging on the highway stop laws and the "slow speed" law of Louisiana. Appellants seem to say that,

in the charge on the stop law,[2] the court erred in stating that the signal, required when a driver stops or suddenly decreases his speed, need be given only to the driver of a vehicle "immediately to the rear." This is precisely the phrase in the statute. The statute is not made inapplicable by *Vowell v. Manufacturers Casualty Insurance Co.*, 86 So.2d 909 (La. Sup. Ct. 1956), which concerned a different duty — that of the vehicle, stopped at night on the highway in the lane of traffic for an extended period, to keep its tail light burning. Obviously that duty is for the benefit not only of those "immediately to the rear"[3] but also those further to the rear who may approach the scene during the time the vehicle remains parked on the highway.

The court correctly charged on the provisions of the "slow speed" statute[4] and referred to like provisions of the city ordinance. The contention that the court should have charged the jury that Rambo was in violation of the "slow speed" statute and guilty of negligence per se is frivolous. "Whether or not the speed in a particular case is slow enough to be in violation of the regulatory statute * * * must necessarily be determined in relation to all of the facts and circumstances existing in that particular case." *Fairbanks v. Travelers Ins. Co.*, 232 So.2d 323 at 328 (La. App.

---

[2] The court was quoting La. R.S. 32:104(C):

"No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal."

[3] Possibly "immediately to the rear" refers to direction rather than space, that is to vehicles directly behind as opposed to those approaching from the front. For purposes of discussion, we will assume, as do plaintiffs, that it refers to spacing.

[4] From La. R.S. 32:64(B), providing that except when certain special hazards exist that require lower speeds, "no person shall operate or drive a motor vehicle upon the highways of this state at such a slow speed as to impede the normal and reasonable movement of traffic."

1970). This was properly a question for the jury, and there is evidence to support its conclusion. Also, it was for the jury to determine whether, under all the circumstances, the flashing red light on the fog truck constituted a special hazard exempting Rambo from the "slow speed" rule.

Appellants appear to make another contention based on interplay of the stop law and the "slow speed" law. The court gave this charge:

> As I have told you, the law requires the operator of a vehicle to drive with reasonable prudence. When a motor vehicle runs into the rear end of a properly lighted vehicle in front of it, and the passengers in the following vehicle seek to recover, the burden is on them to prove that the lead vehicle stopped or suddenly slowed negligently and without warning, or that in some other way it negligently created a hazard or emergency for the following vehicle. Otherwise the necessary conclusion is the the driver of the following vehicle breached his duty to see the lead vehicle, to maintain a proper lookout, and to keep his vehicle under control considering all the circumstances; or that the accident was unavoidable insofar as the preceding vehicle is concerned.

Appellants say that the phrase "properly lighted" was an instruction that the Johnson truck had given proper stopping or slowing signals. We do not agree. We understand "properly lighted" to refer to running lights (an issue not here in dispute), while the later phrase

"without warning" refers to giving the warning signal required by the stop law.

Second, appellants seem to say, without supporting authority, that enactment of the "slow speed" law has caused the quoted charge to be incorrect in any event. Appellants concede that to recover on their "slow speed" theory the burden was on them to show that the truck was going at a slow speed in violation of the statute. This would be within the phrase of the charge "or that in some other way it negligently created a hazard or emergency for the following vehicle." In any event, a plaintiff who relies on the "stop or sudden slowing" statute and the "slow speed" statute as alternative grounds for liability may not escape the burden of proof incident to the former on the basis of his alternative claim of the latter.

6

The court allowed Carmichael to answer over objection a single question whether flashing red lights or revolving lights were utilized in parishes adjoining New Orleans in mosquito control operations, to which Carmichael answered "Yes." The court then carefully explained to the jury that the ordinances in other parishes might differ, that what was a violation of law was governed by legal principles and not by the fact that other persons might violate it; and he explained the state statutes which forbid flashing red lights visible from the front except on certain emergency vehicles. We perceive little relevance to the question, but the careful instructions of the court removed the

prejudice, if there was any. In our opinion this was a far more satisfactory procedure than simply telling the jury to disregard the question and answer.

7

There are other claims of error in jury charges on which we will not comment, other than to say that they are disposed of by what has been said above or are without merit or frivolous. These include refusal to give a directed verdict on liability of McLelland and Rambo and their employers; sudden emergency; contributory negligence; intervening events; duties of guest passengers; duty of motorist meeting a red light; requirements of Louisiana law for flashing red light on an emergency vehicle; and differentiation between "highway" and "roadway."

There was no reversible error in consolidating the cases. The claim that appellants were deprived of due process by being allowed a total of only two and one half hours to argue is frivolous. There was no error in the use, specifically sanctioned by the Federal Rules of Civil Procedure, of special interrogatories.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH

CLERK

ROOM 408-400 ROYAL ST.

NEW ORLEANS, LA. 70130

(504) 527-6514

June 11, 1971

TO ALL PARTIES LISTED BELOW

Re: No. 29275—Beverly Jane Brody, Etc., Et Al vs. Aetna Casualty & Surety Co., Et Al

---

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of

Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
FRANCES WOLFF

By_____
Deputy Clerk

/mfk
cc: Mr. George V. Baus
Mr. G. Harrison Scott
Messrs. John Pat Little
Charles Schwartz, Jr.
Mr. Jerome Weber
Mr. Paul V. Cassisi
Mr. Alvin J. Liska
Mr. Beuker F. Amann
Messrs. Curtis Boisfontain
Edward P. Lobman
Messrs. John V. Baus
Ignatz G. Kiefer
James T. McLelland
John J. Weigel
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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 71-354

BEVERLY JANE BRODY, INDIVIDUALLY, ETC., ET AL
MICKEY K. HARGITAY, ET AL,
Petitioners

VS.

AETNA CASUALTY & SURETY COMPANY, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF JAMES T. MCLELLAND, THE CITY OF NEW ORLEANS AND THE TRAVELERS INSURANCE COMPANY

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1971

NO. 71-354

BEVERLY JANE BRODY, INDIVIDUALLY, ETC., ET AL
MICKEY K. HARGITAY, ET AL,
Petitioners

VS.

AETNA CASUALTY & SURETY COMPANY, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF JAMES T. MCLELLAND, THE CITY OF NEW ORLEANS AND THE TRAVELERS INSURANCE COMPANY

MAY IT PLEASE THE COURT:

The trial and intermediate appellate courts hearing and reviewing the merits of this controversy correctly applied Louisiana law to the evidence presented and, we submit, that if the requested charges submitted by petitioners had been given to the jury, its function would have been invaded. The jury's function, after sixteen days of trial on issues of liability only, were to resolve issues of fact which it did adversely to the claimants. See e.g. *Kermarec vs Transatlantique*, 358 U.S. 625, 3 L. Ed. 2d 550, 79 S. Ct. 406. A review of the petition, the opinion

of the United States Court of Appeals, Fifth Circuit, and the law charges of the trial court will clearly and convincingly affirm that no error of law has been committed on either of the two questions presented in the application.

ISSUES

The nature of this case is a simple rear-end collision concerned with factual issues that were decided adversely to the petitioners.

STATEMENTS OF FACTS DEVELOPED BY THE EVIDENCE

At 2:30 o'clock a.m. on June 29, 1967, an automobile traveling at a high rate of speed, 60 to 80 miles per hour, in which Sam Brody and Jayne Mansfield nee Jayne Ottoviano were riding as guest passengers struck the rear of a moving, well lit tractor-trailer rig being operated by Richard Rambo for his employer, Johnson Motor Freight Lines, on U.S. Highway 90, a two lane paved highway, bordered by wide shoulders. A fogging truck owned by the City of New Orleans was being operated in the general area of the accident, some 314 feet from the point of impact when the accident occurred. Preceding the point of impact was a stretch of roadway approximately 1,200 feet in length which the operator of the Mansfield vehicle traversed and without ever having applied brakes, collided into the rear of the tractor-trailer rig. The speed of the Johnson tractor-trailer unit at the time of impact was estimated to have been in the range of at least 20 miles per hour or as great as 35 miles per hour. The speed limit at the point of impact was 60 miles per hour.

As could be expected, the evidence was conflicting with regard to the speed and of the involved colliding vehicles, lighting of the City fogging unit traveling on the left hand shoulder of the roadway prior to impact, the location of the City fogging unit at the time of impact; and credibility of numerous witnesses, all issues of fact that had to be resolved by the jury.

The two grounds which relators rely upon for the issuance of certiorari will be discussed below in the order presented by petitioners.

ARGUMENT

I. THE SO-CALLED "SLOW SPEED" STATUTE IN THE COURT'S INSTRUCTION

The "slow speed" statute, as designated in *Fairbanks vs. Travelers Ins. Co.*, La. App. 232 So. 2d 323, refers to the provisions in LSA-R.S. 32:64(B) which provides as follows:

> "Except when a special hazard exists that requires lower speed for compliance with Paragraph A of this section, no person shall operate or drive a motor vehicle upon the highways of this state at such a slow speed as to impede the normal reasonable movement of traffic."

The Court instructed the jury concerning the provisions of this portion of the Louisiana Highway Regulatory Act. (App. 3018, 3019).

The Court also charged the jury from another portion of the Louisiana Highway Regulatory Act, namely, LSA-R.S. 32:104 (C) which provides as follows:

> "No person shall stop or suddenly decrease the speed of a vehicle without giving an appropriate signal in the manner provided hereinafter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal." (App. 3019)

The above charges followed one another in sequence and the Court thereafter stated the following:

> "This statute and ordinance requires a signal when a driver stops or suddenly decreases his speed. The signal is required by the statute or ordinance to be given only to the driver of a vehicle immediately to the rear. In order to prove negligence by violation of the statute or ordinance, the plaintiffs must show by a preponderance of the evidence that Mr. Rambo's truck stopped or suddenly decreased its speed; that the Harrison vehicle was immediately to his rear and that Mr. Rambo had an opportunity to give a signal. Unless all of these things are shown, Mr. Rambo's failure to give a signal would not violate the statute." (App. 3019-3020)

Obviously, the language of the charge isolated above was referring not to the so-called provisions of the slow speed statute as defined in the *Fairbanks* case, supra, but rather had reference to another provision of the Louisiana Highway Regulatory Act. The language employed by the Court was singular in nature. Hence, the Court was not requested nor was it necessary to state anything further concerning the slow speed statute than to read it to the jury. The jury was free to then determine whether Rambo operated his vehicle in such a manner as to impede normal and reasonable movement of traffic.

Even should the jury have concluded that Rambo violated LSA-R.S. 32:64(B), it was still required to determine if this statutory violation was a proximate cause of the accident as the *Fairbanks* opinion observed on Page 328:

> "Whether or not the speed in a particular case is slow enough to be in violation of the regulatory statute, and whether it is a legal or proximate cause of an accident, must necessarily be determined in relation to all of the facts and circumstances existing in that particular case. This would properly be a question to be decided by the trial judge or jury, and if there is sufficient evidence to support their finding, appellate courts should not substitute their own conclusion for that of the jury."

Thus, the cause-in-fact must also be decided by the jury even should there have been negligence on the part of Rambo, a fact determined adversely to the petitioners. There was conflicting evidence as to the speed of the Rambo vehicle, 20 or 35 miles per hour depending upon who the jury sought to believe. Moreover, there being no minimum speed required, the jury could have easily determined in its deliberations that Rambo's vehicle was not impeding the normal flow of traffic. The cited decision is in line with numerous Louisiana cases requiring a determination that a violation of the statute is not actionable negligence unless it is a proximate cause of the accident. *Dixie Drive-It-Yourself System vs American Beverage Co.*, 242 La. 471, 137 So. 2d 298 (1962); *Hollabaugh-Seale Funeral Home, Inc. vs Standard Accident Ins. Co.*, 215 La. 445, 41 So. 2d 212 (1949); *Mayon vs New Amsterdam Casualty Co.*, La. App. 1966, 191 So. 2d 688.

The Court's entire charge concerning the law of causation appears at Pages 3024-3026, inclusive, of the Appendix. When viewed in its entirety, Louisiana law of proximate cause was correctly explained to the jury by the Trial Judge. See *Dixie Drive-It-Yourself System vs American Beverage Co.*, supra; *Adams vs. Great American Indemnity Company*, La. App. 1959, 116 So. 2d 307, (Cert. Den. 1960); *Harvey vs Great American Indemnity Co.*, La. App. 1959, 110 So. 2d 595, 600; *Ardoin vs Williams*, La. App. 1959, 108 So. 2d 817.

II. THE DIRECTED VERDICT ISSUE.

Error is claimed that the Court should have instructed the jury to find negligence per se because of an alleged illegal operation of the vehicle, presumably while being operated on the shoulder of the roadway in going from one camp road to another, and the use of an illegal flashing red light. This alleged error is immaterial as the jury did find negligence of a technical nature on the part of the City of New Orleans' employee.

Pretermitting the actual finding of the jury of technical negligence on the part of McLelland, it would have been error for the Court to direct a finding of negligence by the jury. There was a conflict in the testimony as to whether the flashing red light located on the dome of the City fogging unit was in fact in operation while the vehicle was being maneuvered on the shoulder of the highway. Mr. McLelland testified that while traveling from camp road to camp road which intersected Highway 90, his flashing red light was not in operation. (App. 767, 770, 771, 776). He explained to the jury on cross-examination that he had misunderstood the police officer's

questioning in an apparent contradictory written statement he gave subsequent to the accident. McLelland stated he told the police he was using his left turn signal, not the red dome light atop his unit, and obviously he was misunderstood. (App. 773, 774, 777). This testimony was admittedly opposite to the testimony of Rambo but a jury issue was present. *Lumbermens Mutual Casualty Co. vs Nolan*, 331 F. 2d 711 (5th Cir. 1964); *McQueen vs Navajo Freight Lines, Inc.*, 293 F. 2d 590 (8th Cir. 1961).

Additionally, it would have been error for the Court to have instructed the jury that the operation of the vehicle on the shoulder of the roadway was negligent simply because the statutory law applicable, namely the Louisiana Highway Regulatory Act and the City of New Orleans Traffic Ordinance, do not prescribe such as negligence. The instruction by the Court pertaining to the use of a flashing red light and driving a vehicle on the shoulder of a roadway are found on Pages 319-323, inclusive. The Court instructed the jury that violation of the statutory provisions with regard to the use of the flashing red light is negligence. But as previously noted, whether the flashing red light was in operation immediately preceding the accident was a factual matter to be determined.

Neither the traffic ordinances for the City of New Orleans nor the Louisiana Highway Regulatory Act prohibit the use of a vehicle on the shoulder of a roadway and Petitioners do not cite any authority prohibiting such conduct. Even assuming arguendo that such an inhibition was contained in the State act or City ordinance, the jurisprudential authority cited to the Court, *Pierre vs Allstate Insurance Co.*, 257 La. 471, 242 So. 2d 821, 831, (1971) adds nothing new to what has always been the

law of Louisiana. See *Dixie Drive-It-Yourself System vs American Beverage Co.*, supra. In *Pierre*, the Supreme Court after finding a violation of a prohibitive statute thereafter made the factual determination (Louisiana Appellate Review includes a review upon the law and the facts, Article VII, Section 10, Louisiana Constitution of 1921) on Page 828 as follows:

> "We have determined as a matter of fact that the unattended Chrysler automobile was parked on the paved portion of the highway in such a manner as to obstruct the passage of two-way traffic on the highway, along which the pick-up truck carrying plaintiffs' father had been preceding south approximately forty feet in front of the Mack dumptruck operated by Miller. We have also found as a matter of fact that the pick-up truck had to stop because of the obstructing parked Chrysler, and that the inattentive Miller, failing to keep a proper lookout, struck the stopped pick-up truck from the rear, propelling it into the parked Chrysler and finally injuring plaintiff's father. It must naturally follow that the Chrysler's obstructing of the highway was a contributing cause-in-fact of the accident."

There is therefore no variance between the most recent pronouncement of the Louisiana Supreme Court and the opinion of the Fifth Circuit in this case as to the application of Louisiana law. Violation of a statutory duty amounting to negligence still requires a factual determination of proximate cause. *Beraud vs. Allstate Insurance Company*, La. App. 1971, 251 So. 2d 402, 404:

> "Therefore, for the violation of a highway safety statute to result in a finding that the violation

was actionable negligence or actionable contributory negligence, the conduct complained of must be a cause-in-fact of the accident and the purpose of the statute must prescribe the conduct causing the accident and injury. Dixie Drive-It-Yourself System New Orleans Co. vs American Beverage, cited supra."

The verdict of the jury based upon the law given and the decision of the intermediate appellate court are in consonance with Louisiana law, accordingly, the petition should be denied.

Respectfully submitted,

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